

**No. 10- COURT'S ORDER WHETHER THE CASE IS OR IS
NOT APPROVED FOR REORTING**

[Chapter VIII, Rule 32 (2) (b)]

Description of Case

W.P. NO. 243 of 2006 (M/S)

The Good Shepherd Agricultural Mission Through its Director
Malcom Reencounter, Banbasa, District Champawat.

Versus

Mr. Carol Ruth Cook R/O 1517 Illinois Avenue Amicio 500014
USA and Others.

A.F.R. (Approved for Reporting)

Not Approved for Reporting

(B.S. Verma, J.)

Initials of Judge

Date: 22-03-2006

THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 243 of 2006 (M/S)

The “Good Shepehered” Agricultural Mission Through Its Director
Malcom Rencountre, Banbasa, District Champawat

.....Petitioner.

Versus

1. Mrs. Carol Ruth Cook Wife of Keeth, R/O 1517 Illinois Avenue Amiciao 500014. Through Sri Sanjai Gupta S/O Sri Gyan Chandra Gupta R/O F-179, Prashant Vihar Delhi-110085.
2. Mrs. Maxine Shipway W/O Warwick Shipway, Resident of 5, Oberai Palace Ravens Wood Tasmania 72502 Australia through Sri Sanjai Gupta Son of Sri Gyan Chandra Gupta R/O F- 179, Prashant Vihar, Delhi-110085.
3. Mr. Warwick Shipway Son of Not Know, R/O 5, Oberai Palace Ravens Wood Tasmania 72502 Australia through Sri Sanjai Gupta Son of Sri Gyan Chandra Gupta R/O F- 179, Prashant Vihar, Delhi-110085.
4. Sri Sanjai Gupta Son of Sri Gyan Chandra Gupta R/O F-179, Prashant Vihar, Delhi-110085.
5. Mrs. Rivica Scadlay Wife of Mr. Jim Scadlay Resident of 23809 Laynine Circle Chugaik Alaska 99567 U.S.A. Through Sri Sanjai Gupta Son of Sri Gyan Chandra Gupta R/O F- 179, Prashant Vihar, Delhi-110085.

... Respondents.

Sri Arvind Vashist, learned counsel for the petitioner.
Sri H.M. Raturi, learned counsel for the respondent no. 3.

Dated March 22, 2006

Hon’ble B.S. Verma, J.

Heard learned counsel.

The petitioner has filed the present writ petition for a writ, order or direction in the nature of certiorari quashing the impugned judgment and order dated 17.2.2006 and impugned part of order by which the Civil Judge (J.D.) only issued notices dated 28.2.2006 in O.S. No. 5 of 2004, the Good Shepherd Agriculture Mission Vs. Sri Carol Ruth Cook and others and restored the Original Suit aforesaid to its original number.

Relevant facts giving rise to the writ petition are that the Misc. Civil Appeal No. 3 of 2004 preferred by the petitioner before the District Judge Champawat arising out of an order dated 16.6.2004 passed in Civil Suit No. 5 of 2004 was dismissed and the lower court record was ordered to be transmitted to the trial court immediately. The record of original suit was received in the trial court (Civil Judge (Jr. Div.) Champawat and on 3.1.2006, the trial court passed an order for issue of notices to both the parties fixing 3.2.2006 for appearance. On 3.2.2006 again, none appeared for the parties and notices were ordered to be issued fixing 17-2-2006. on 17-2-2006, the suit was dismissed in default of both the parties. Thereafter, the petitioner after enquiry made from his counsel came to know about the dismissal of his suit on 17.2.2006 and obtained copy of the order, dated 17.2.2006. Subsequently, the petitioner moved an application under Order 9, Rule 4 CPC read with Section 151 of the C.P.C. for recalling the order dated 17.2.2006 on which the learned Trial Court vide order dated 28.2.2006 passed order for issue of notices to the Opposite Parties-respondents.

In the course of arguments, the learned counsel for the petitioner Sri Arvind Vashist confined his prayer to the extent only that the application of the petitioner moved under Order 9, Rule 4 C.P.C. is required to be heard on merit as early as possible.

It reveals from a perusal of the record that the suit was dismissed under the provisions of Order 9, Rule 3 of the C.P.C. on 17.2.2006 and the restoration application was fixed under Order 9, Rule 4 CPC (Annexure No. 7 to the writ petition).

Order 9, Rule 4 C.P.C. provides that “where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred in rule 2 or for his non-appearance, as the case may be, the Court shall make an

order setting aside the dismissal and shall appoint a day for proceeding with the suit.”

It reveals from the language of the aforesaid Rule 3 of Order 9 that where neither party appears when the suit is called on for hearing, the Court may dismiss the suit and under the provisions of Rule 4, the Court may restore the suit without prior notice to the opposite party. It appears that the procedure applied by the trial court for issuance of notice is applicable to the provisions of Order 9, Rule 9 CPC when the defendant was present at the time of dismissal of suit in the absence of the plaintiff.

As narrated above, the order dated 28-2-2006 passed by the learned Civil Judge (Jr. Div.) Champawat is manifestly erroneous and the Civil Judge (Jr. Div.) Champawat is directed to hear the application of the plaintiff on merit without issuing the notice to the defendants. It is only after restoration of the suit, the Court may issue notice.

In the facts and circumstances of the case and considering the prayer made by the learned counsel for the petitioner-plaintiff, the order of the Civil Judge (Jr. Division) Champawat dated 28.2.2006 deserves to be modified. There is no need for issue of notice to the other party prior to the hearing on the restoration/recall application. The writ petition is liable to be partly allowed.

The writ petition is partly allowed. The order dated 28.2.2006 is modified to the above extent. The application of the petitioner moved under Order 9, Rule 4 of the C.P.C. (Annexure No. 7 to the writ petition) will be heard by the learned Civil Judge (Junior Division) Champawat on merit in accordance with law and in the light of the above observations.

(B.S. Verma, J.)